NO. 47567-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

PROTERRA DEVELOPMENT VENTURES, LLC,

Plaintiffs/Appellant,

v.

FIRST AMERICAN TITLE INSURANCE CO., et al,

Defendants/Respondents

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE SCOTT A. COLLIER

APPELLANT'S BRIEF

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INTRODUCTION

Proterra purchased some property under development real estate in Clark County from Sevier under a real estate purchase and sales agreement (RESPA). Escrow was being handled by First American Title (FATCO). Under the RESPA, costs of final engineering were to be paid by Sevier and if the final engineering was not complete by closing, an escrow of 150% of the anticipated costs of final engineering would be created. A sum of $50,000.00 was anticipated for those costs and the escrow was then set at $75,000.00.

Indeed, final engineering had not been completed by the time of closing. The escrow agent then prepared instructions and sent them to buyer which did not allow it to verify the expenses. Indeed, when the seller instructed FATCO to pay previously incurred expenses not related to final engineering, with the remaining funds to be returned to seller, FATCO did that, while never informing the buyer of the application of any of the $75,000.00 funds.

The court ultimately determined that final engineering expenses which should have been paid by Sevier amounted to $59,221.93.

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ASSIGNMENT OF ERROR

The trial court erred in granting the motion for summary judgment made by First American Title Insurance Company.

ISSUE PRESENTED

As a matter of law did the escrow agent met her fiduciary duty when she did nothing to protect one side of a transaction in preparing and carrying out escrow instructions?

STATEMENT OF THE CASE

In October, 2005 the Proterra's assignor entered into a Real Estate Purchase and Sales Agreement (RESPA) for property under development $4.7 million. The completion of engineering was a key factor for Proterra's assignor. (CP 8-18).

Pursuant to the Addendum to the RESPA (paragraph 5), closing was scheduled for after closing as follows:

> Seller shall exercise due diligence to obtain Final Engineering Approval and complete all entitlements and approvals in the shortest possible time. This transaction shall close no later than thirty (30) days from when Final Engineering Approval status is obtained as defined by the City of Ridgefield, but no later than February 28, 2006, unless Buyer and Seller have mutually agreed on an alternative/extended closing date. Final Engineering Approval status is more specifically defined as the watermarked stamped set of engineering drawings and the issuance of the "Determination of Final Engineering Approval" letter by the City of Ridgefield. In the unlikely event that Final Engineering Approval has not been obtained prior to the February 28, 2006 closing date, Seller agrees to put 150% of the remaining costs, a

> mutually agreed upon amount, to obtaining Final Engineering Approval in an Escrow Holdback Account. Seller to remain involved with appropriate jurisdictions and Olsen Engineering until Final Engineering Approval has been obtained. The Escrow Holdback Account will be utilized to pay for (and authorized for release by Seller) the completion of Final Engineering Approval. Seller shall provide Buyer a final accounting of the Escrow Holdback Account upon receipt of Final Engineering Approval and receipt of all subject invoices. After payment of invoices, remaining funds shall be released to seller. (CP12).

The agreement provided that all engineering costs would be borne by seller. Paragraph 16.3 stated:

> All costs associated with progressing "Canyon's Ridge" through Preliminary Plat Approval and Final Engineering Approved status is the responsibility of Seller. Final Engineering Approval is more specifically defined as the watermarked stamped set of engineering drawings and the issuance of the "Determination of Final Engineering Approval" letter by the City of Ridgefield.....Seller's related costs to include the Final Engineering review fee, paid to the City of Ridgefield prior to the pre-construction meeting with the City. This fee is generally required to be paid before Final Engineering plans are released and a pre-construction meeting can be scheduled. (CP 13)

First American Title (FATCO) handled escrow. (CP 5). Escrow instructions were used dated February 24, 2006. Paragraph 7 contained standard escrow language on what would happen in the event of a dispute between buyer and seller or conflicting demands made upon the escrowee—giving FATCO, among other things, the right to interplead the funds. (CP 20-25).

Final engineering approval did not occur before closing, so the process of holdback was instituted. In that regard, FATCO documents

show that the Escrow Officer, Anne Snyder instructed the seller what the holdback escrow document needed to contain. (CP. 57, lines 15-19), referring to CP 60-62, FATCO computer file log. The buyer and seller then signed this FATCO-generated escrow agreement on March 13, 2006. (CP 28). This non-standard and special form was used despite the fact that FATCO has standard holdback agreements, and the apparent excuse for those not being used being the fact that FATCO had already received its fee when the transaction closed. No language is present in FATCO-generated escrow agreement in this case such as set forth in paragraph 7 of the standard agreement.

Indeed, the FATCO manager testified that the standard agreement differed in one crucial respect: "It would have standardized language indicating the purpose of the holdback based on our understanding of it.....If there becomes as dispute or the funds are not released as agreed upon, we have the ability to deduct a monthly fee, typically. However, this agreement didn't allow for that." (CP 57) *Deposition of Cherilyn Costa*, P. 20 lines 13-12).

Here, the lack of any safeguards proved fatal for buyer. At the request of the seller alone, FATCO paid charges unrelated to final engineering and incurred prior to the time that the Holdback Agreement

was even signed, with the latest ones being from a month earlier (February, 2006). *Costa Deposition* Exhibits 5 and 6. (CP 64-67)

Costa testified in her deposition that she is unaware of any investigation done as to the payments made in the sum of $52,763.07 (only 2 days after the account was created). *Costa Deposition* P 28 lines 3-5. (CP 58). Further, it promptly paid Kirschenbaum's request to pay the second installment of $18,923.60. (CP 59).

Additionally, in her deposition she admitted that the final balance of $3,313.33 was remitted to seller with no investigation to determine if there were any remaining final engineering expenses. *Costa Deposition* P 37 lines 21-23. (CP 59). FATCO communicated nothing to buyer about the payments it made-including the final balance.

Indeed, as the court ultimately determined, the unpaid engineering expenses (for which Proterra obtained judgment against seller, a likely uncollectible entity) was $59,221.93. (CP 89).

Essentially, the whole purpose of the escrow hold-back was thwarted and FATCO's escrow officer did everything to favor seller and nothing to protect buyer.

Proterra sued FATCO on the basis of breach of fiduciary duty. FATCO moved for summary judgment which the Clark County Superior Court granted. It further obtained a judgment against both Proterra and

seller for its attorney fees on the basis of an attorney fee clause in the underlying transaction (CP 83-86).

This appeal followed.

ARGUMENT

I. Standard of Review

This is a review of a summary judgment. As such, all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, and all questions of law are reviewed de novo. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.* 134 Wash.2d 692, 952 P.2d 590 (1998).

II. There are genuine issue of material fact as to whether FATCO breached its fiduciary duty to Buyer.

An escrow officer has fiduciary duties of honesty, skill and diligence to both sides in the transaction. *National Bank v. Equity Investors*, 81 Wn. 2d 886, 506 P.2d 20 (1973).

Although FATCO apparently has holdback agreements it can provide customers, it did not do that in this case, but actually instructed the seller (with no evidence of consultation with the buyer) on what it should contain. What was drafted was both vague and one-sided. As is readily seen, the seller unilaterally controlled payment and there was no mechanism for the buyer to monitor the payments. None of the payments

made by FATCO actually related to final engineering; in that regard the court determined that those were in the sum of $59,221.93.

In the area of drafting real estate documents, escrow officers are held to an attorney standard of care.

The Washington Supreme Court has ruled: "This court has held that a layman who attempts to practice law is liable for negligence. *Mattieligh v. Poe,* 57 Wash.2d 203, 204, 356 P.2d 328 (1960). The duties of an attorney practicing law are also the duties of one who without a license attempts to practice law. *Burien Motors, Inc. v. Balch,* 9 Wash.App. 573, 513 P.2d 582 (1973)." *Bowers v. Transamerica Title Ins. Co.,* 100 Wash. 2d 581, 586-87, 675 P.2d 193, 198 (1983).

That case was a consumer protection case in which the escrow officer chose the wrong forms which did not protect one of the parties to a transaction and Consumer Protection Act liability **against** the escrowee was found as a matter of law.

Similarly here, FATCO escrow officer Snyder would be held to the standard of a reasonable attorney. Clearly, the document which she helped draft was totally inadequate in protecting the rights of one of the parties to the transaction. A simple step of using language in their standard form—which would address disputes –would have sufficed. Here, there was nothing. Under the authority of *Bowers v. Transamerica Title Ins.*

Co., should summary judgment be have been entered, it should be granted against, not for, FATCO. In all events, under CR 56 there are genuine issues of material fact as to whether use of the form in this case met the duty of care required of an escrowee.

III. Even if this court holds that the use of the holdback agreement by the agent met the standard of reasonable care, there are genuine issues of material fact whether FATCO was negligent in paying bills unrelated to final engineering.

The only bills contemplated by the escrow were final engineering bills. This is made clear with respect to the RESPA, the very transaction FATCO was handling. (CP 13) What was paid here were old bills, already incurred before the RESPA was even signed. Even a cursory look at the bills by the escrowee would have revealed that fact.

The only reference to any payment of anything in particular is in paragraph 6. (CP 28). In context, it requires that, pursuant to paragraph 5, after Seller has provided Buyer a final accounting (which never occurred), FATCO would distribute "remaining funds" to Seller. As stated above, by its plain meaning, FATCO obviously violated the instructions by payment of those $3,313.33 funds without prior evidence of a final engineering certificate.

FATCO's position is that the requirement to pay based on the invoices is in paragraph 4. That simply states: "Invoice(s) along with authorization to pay same may only be made to First American Title by seller....". By its plain meaning, that language only gives authority to pay, not an obligation to pay.

The rule of construction regarding ambiguity is particularly applicable here. *Lamar Outdoor Advertising v. Harwood*, 162 Wash. App. 385, 254 P.3d 208 (Div. 3 2011) (trial court properly entered judgment against billboard owner where owner drafted contract and ambiguity concerning what constituted "property" would be construed against owner); *King v. Rice*, 146 Wash. App. 662, 191 P.3d 946 (Div. 1 2008), review denied, 165 Wash. 2d 1049, 208 P.3d 554 (2009) (ambiguity as to whether modular structure was "fixture" within contract would be construed against drafter); Restatement Second, Contracts § 206 *Universal/Land Const. Co. v. City of Spokane*, 49 Wash. App. 634, 745 P.2d 53 (Div. 3 1987); *Huber v. Coast Inv. Co., Inc.*, 30 Wash. App. 804, 638 P.2d 609 (Div. 2 1981) (loan agreement should be construed against drafter).

Here, FATCO essentially drafted the agreement—by supplying one party with the necessary terms. As such, as between Proterra (which

had nothing to do with its drafting) and FATCO, the construction should be against FATCO. In that regard, at a minimum, in construing the meaning of paragraph 4 as permissive or mandatory, there is a genuine issue of material fact. If FATCO has the right, but not the duty, to pay under paragraph 4, knowing full well that the purpose of the agreement as plainly stated in paragraph 2 was to "ensure expenses to obtain **final engineering approval** are paid" a genuine issue of material fact exists as to whether it breached its fiduciary duty to Proterra by paying without any investigation whatsoever as to what the nature of the expenses.

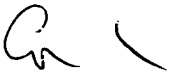
Even if the court would hold that FATCO could blindly pay (without any communication to buyer) and escape liability, it is completely inexcusable that it remitted the final $3,313.33 to seller on May 17, 2006. In that regard, it is clear the contract required an accounting of final engineering approval before any funds were to be returned. Under FATCO's argument, if seller had submitted his Nordstrom's bills, FATCO would have met its fiduciary duties by paying.

The lack of a care exercised by the escrow agent presents a genuine issue of material fact as to whether the fiduciary duty was met and summary judgment should not have been granted.

CONCLUSION

The court erred in granting FATCO's motion for summary judgment inasmuch as there are genuine issues of material fact as to whether the fiduciary duties it owed plaintiff was met. The case should be reversed for trial. The fee award to FATCO should be vacated.

RESPECTFULLY SUBMITTED this 20th day of August, 2015.



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CERTIFICATE OF SERVICE

I hereby certify that I served Appellant's Brief on the following named person(s) on the date indicated below by mailing with postage prepaid; to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below:

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